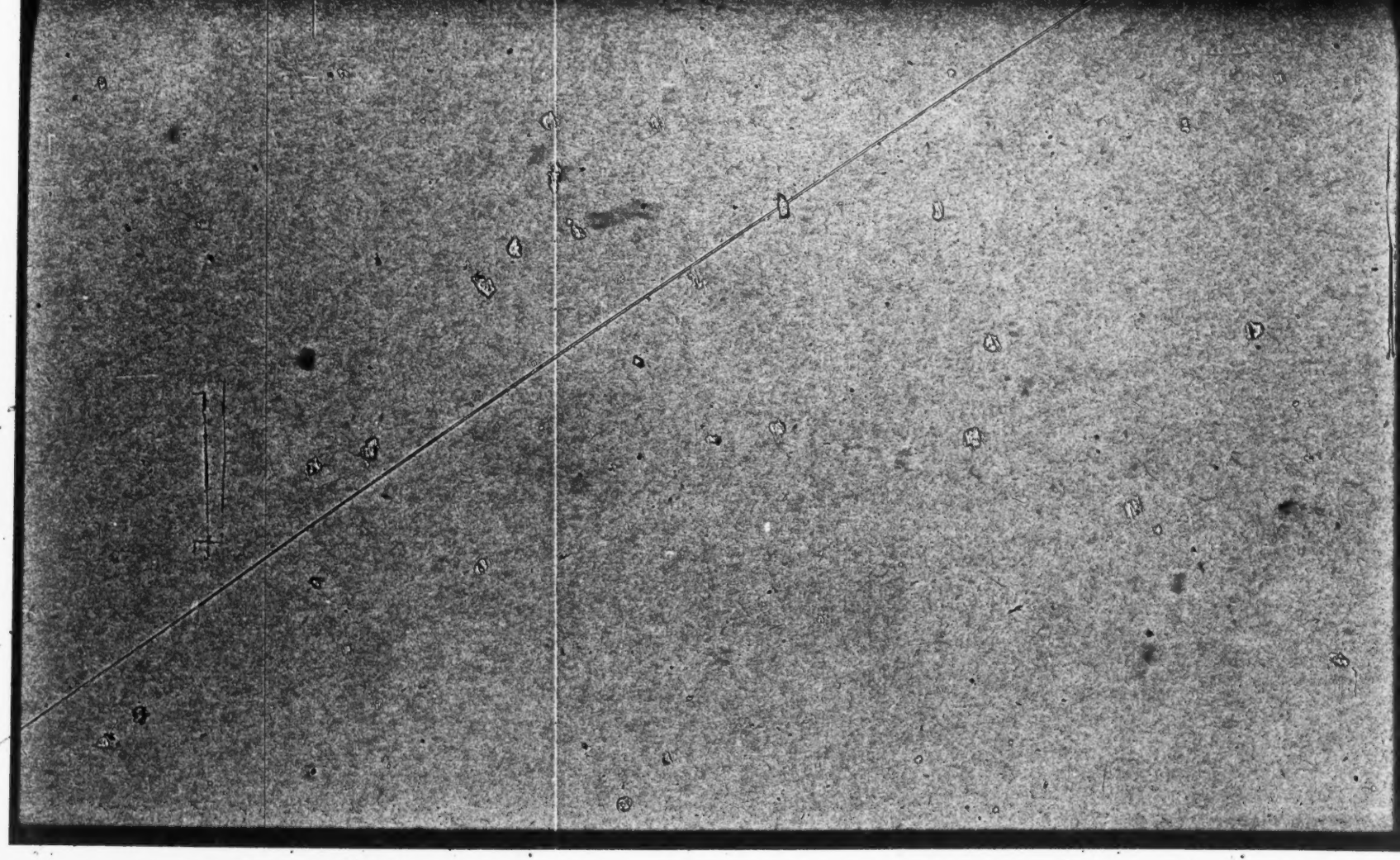

THE PUBLIC UTILITIES COMMISSION OF OHIO
AND THE CITY OF COLUMBUS, OHIO,

Appellants,

MEMORANDUM ON FINALITY OF THE JUDGMENT OF THE SUPREME COURT OF OHIO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 608

THE COLUMBUS GAS AND FUEL COMPANY,

Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO AND THE CITY OF COLUMBUS, OHIO,

Appellees.

MEMORANDUM ON FINALITY OF THE JUDGMENT OF THE SUPREME COURT OF OHIO.

Counsel were asked by the Court during the oral argument to cite the Court to some indication in the record that the order of the Supreme Court of Ohio remanding the cause to the Public Utilities Commission for "further proceedings and orders not inconsistent with this entry" was a final order. This was a matter of state practice, concerning which no question had theretofore been raised in this or any other case within the knowledge of counsel. Under the surprise of the moment counsel were unable to recall anything in the record which would aid the Court. This is still true so far as the printed record is concerned. However, there is in the record on file in the office of the Clerk of this Court, but omitted in printing under the prac-

tice of the Court, definite evidence of the view taken of the nature of the judgment by the Chief Justice of the Supreme Court of Ohio. Under Rule 36 of this Court the Chief Justice of the State Court is permitted to grant a supersedeas and stay of execution upon taking the proper security therefor. Pursuant to this rule an application was made to Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, for such supersedeas and stay of execution. The application was granted, (R. 124), and a bond approved by said Chief Justice. Said bond contained the following references to the judgment of the court below:

> "* * * in accordance with the *final* judgment of the Supreme Court of the State of Ohio in said case, if said *final* judgment should be affirmed by the Supreme Court of the United States.
>
> * * * judgment was rendered against said The Columbus Gas and Fuel Company reversing the findings and order of said Commission in Advance Utility Rate Proceeding No. 5935 on its docket, which judgment became *final* upon the denial by the Supreme Court of Ohio on the 20th day of September, 1933, of the application of The Columbus Gas and Fuel Company for a re-hearing;
>
> Whereas, The Columbus Gas and Fuel Company has obtained an order allowing an appeal * * * to review said *final* judgment * * *.
>
> * * * if the Supreme Court of the United States should affirm said *final* judgment * * *" (Italics ours.)

A complete copy of said bond is attached hereto, marked "Exhibit A".

The references to the judgment as "the final judgment of the Supreme Court of Ohio" and the statement that said "judgment became final upon the denial by the Supreme Court of Ohio" of appellant's application for re-hearing,

are consistent with the State practice, and the statutes under which the proceedings in this case were conducted.

We ask the Court to examine Section 3982 of the General Code of Ohio (Appellant's opening brief p. 296) which delegates to a City Council the legislative power to fix rates by ordinance for a future period. Also Section 614-46 of the General Code of Ohio (Appellant's opening brief, p. 293) which delegates to the Public Utilities Commission of Ohio the legislative power to substitute a different rate for the same future period, or to ratify and confirm the rate fixed by the City Council if found to be just and reasonable. When these sections are read in the light of Section 544 of the General Code of Ohio (Appellant's opening brief, p. 291) which grants to the Supreme Court of Ohio the power to reverse, vacate or modify an order of the Commission, we believe there will be no doubt that the Chief Justice of the Supreme Court of Ohio acted advisedly in approving a bond reciting that the judgment of the Court was a final decision. That Court by its judgment (R. 278) found the 48c ordinance rate fixed under legislative authority by the City Council to be "not unlawful nor unreasonable". Under that judgment the provisions of Section 614-46 G. C. *supra*, required the Public Utilities Commission to dismiss the complaint and leave the duly authorized action of the City Council fixing the 48c rate in effect. The closing paragraph of the separate opinion of the Minority Commissioner (R. 214) indicates the proper procedure of the Commission. The validity of the challenged 48c ordinance was finally sustained by the decision of the Court. The claimed confiscatory rate was put into effect. No action of the Commission could change it, none was required to render it effective, and the jurisdiction of this Court immediately attached for a review of that judgment.

In addition to the jurisdiction of this Court to review the judgment sustaining of the validity of the 48c ordinance,

the question of the constitutionality of the 55¢ rate was definitely raised by Appellant in the court below (R. 17, paragraph 50 of petition in error) and was definitely decided by the court below when it held a 48¢ rate to be non-confiscatory.

Under the view taken by this Court it will be impossible for a utility to realize the benefit of a review by this Court until and unless the Commission and the Ohio Supreme Court agree on the same rate, and this may never occur. Assume this case goes back to the Commission, and assume a power in the Commission to fix a 50¢ rate. Notwithstanding that rate should be confiscatory there would be no appeal to this Court if the Ohio Supreme Court should adhere to its holding that a 48¢ rate is not unreasonable or confiscatory. The case would again and again have to be sent back to the Commission until the Commission fixed a rate which the Court was willing to approve. The utility in the meantime would be compelled to lose any benefit from any partial relief granted by the Commission, in order to submit to this Court the question of whether it was entitled to more. This seems a harsh rule, and is not required by the Ohio law. Both the Court and Commission in Ohio regard the Court's judgment as final, and therefore the basis of an appeal to this Court.

A case of clear confiscation may thus be shuttled back and forth between the Commission and the Court until the ordinance expires and the utility thereby deprived of all recourse.

A dismissal here will end the error proceeding in the Ohio Supreme Court and imperil the impounded funds (R. 121), which the Court below may order distributed in many small amounts to Appellant's gas consumers.

Respectfully submitted,

EDWARD C. TURNER,
ALBERT M. CALLAND,
Counsel for Appellant.

March 15, 1934.

"EXHIBIT A."

SUPREME COURT OF OHIO

Nos. 23864 and 23868

THE COLUMBUS GAS AND FUEL COMPANY,
Plaintiff in Error,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Defendant in Error

and

THE CITY OF COLUMBUS,
Plaintiff in Error,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Defendant in Error

CONSOLIDATED BY ORDER OF THE COURT DATED THE 25TH DAY OF APRIL, 1933

SUPERSEDEAS BOND

Know all men by these presents:

That we, The Columbus Gas and Fuel Company, as principal, and Columbia Gas & Electric Corporation, a corporation under the laws of the State of Delaware, as surety, are jointly and severally held and firmly bound unto the State of Ohio for the benefit of the consumers of natural gas in the City of Columbus, Ohio, in the full and just sum of fifty thousand dollars ($50,000) to be paid to said consumers in accordance with the *final* judgment of the Supreme Court of the State of Ohio in said case, if said *final* judgment shall be affirmed by the Supreme Court of the United States.

The condition of this undertaking is such that:

Whereas on the 21st day of June, 1933, in a suit pending in the Supreme Court of Ohio between said The Columbus Gas and Fuel Company, as plaintiff in error, and the Public Utilities Commission of Ohio, as defendant in error, being No. 23864 on the docket of the Supreme Court of Ohio, with which has been consolidated a suit between the City of Columbus as plaintiff in error and the Public Utilities Commission of Ohio as defendant in error, being case No. 23868 on the docket of the Supreme Court of Ohio, judgment was rendered against said The Columbus Gas and Fuel Company reversing the findings and order of said Commission in Advance Utility Rate Proceeding No. 5935 on its docket, which judgment became *final* upon the denial by the Supreme Court of Ohio on the 20th day of September, 1933 of the application of The Columbus Gas and Fuel Company for a re-hearing, and,

Whereas, The Columbus Gas and Fuel Company has obtained an order allowing an appeal from the Supreme Court of Ohio to the Supreme Court of the United States in said case and filed a copy thereof in the office of the Clerk of the Supreme Court of Ohio to review said *final* judgment, and a citation directed to said Commission citing and admonishing it to be and appear before the Supreme Court of the United States at Washington, in the District of Columbia, within forty days from the date thereof.

Now if said The Columbus Gas and Fuel Company shall prosecute its said appeal to effect and answer and pay all damages if it shall fail to make good its appeal and make refunders to the consumers of natural gas in said City of Columbus, Ohio, if the Supreme Court of the United States should affirm said *final* judgment, then the above obligation shall be void, otherwise to be and remain in full force and virtue.

IN WITNESS WHEREOF The Columbus Gas and Fuel Company by its President and Secretary and Columbia Gas & Electric Corporation by its Vice-President and Assistant Secretary, have hereunto signed their names and affixed their corporate seals this 28th day of September, 1933. (Italics ours.)

THE COLUMBUS GAS AND FUEL COMPANY,
By C. A. WEAVER,
Its President;
and
[SEAL.] P. A. ALBERTY,
Is Secretary.

COLUMBIA GAS & ELECTRIC CORPORATION,
By E. REYNOLDS, JR.,
Vice President,
[SEAL.] H. H. PELL,
Assistant Secretary.

Approved:

CARL V. WEYGANDT,
Chief Justice of the Supreme Court of Ohio this 28th day of September, 1933.